

Application Serial No. 10/091,160  
Attorney Docket No. 67328

(3) REMARKS

Reconsideration and allowance of claims 1-10, all of the claims under consideration, are requested in view of the above amendments and the following remarks. No claims have been added or cancelled.

**35 USC §112, first paragraph, Enablement**

(1) Claims 1-10 have been rejected under 35 USC §112, first paragraph, as failing to comply with the written description requirement because the claim limitation of "rolls press the mixed ingredients into a progressively thinner slab without breaking the crisp baked cookie pieces" is said to be without support in the specification.

Claims 1 and 6 have now been amended to point out that the rolls "minimize breakage of the fragile baked inclusions" as is fully supported per the examiner's statement.

Accordingly, reconsideration and withdrawal of this basis for rejection are believed in order.

(2) Claims 1-10 have been rejected under 35 USC §112, first paragraph, as failing to comply with the written description requirement because the claims call for "filler fat" and "coating fat" but are said to be without sufficient support for these terms.

Applicant again refers to the specific definitions of the noted terms in the specification, as quoted in the last response. The applicant has defined the specific terms consistent with the meanings given them by those skilled in the art. Applicant submits that the examiner's concern that applicant has not shown that this is consistent with art accepted definitions is not directly in issue. The fact is that applicant has provided definitions which draw a line of distinction and the patent office has not shown that there is any reason why they should not be given full credence, such as being repugnant to the accepted definitions. Indeed, the citation to U. S. Patent No. 5,378,490, shows the opposite.

Application Serial No. 10/091,160  
Attorney Docket No. 67328

In addition, the applicant is entitled to supply whatever added definitional terms to known terms to provide a clear meaning, even where the new definition is not fully consistent with one or more of their ordinary meanings. See, for example, MPEP §2173.05(a)III.

In summary, where the applicant has defined terms in the description in clear terminology and those definitions are not repugnant to accepted definitions, there should be no §112 objection or rejection by the Patent Office.

Accordingly, reconsideration and withdrawal of this basis for rejection are believed in order.

### **35 USC §103 -- Unobviousness**

Claims 1-10 have been rejected under 35 USC §103(a) as defining an invention which is obvious from U. S. Patent No. 6,676,982, to Mody. This rejection is respectfully traversed.

The invention relates to a process for forming a food bar containing discrete pieces of crisp cookie. To achieve a suitable result, the cookie pieces are bound together by a binder comprised of two different types of normally solid fats. This is far different from the Mody reference where the product essentially includes two different kinds of puffed rice and employs a sugar based binder.

The invention provides a process wherein the cookie components and the binder ingredients are uniquely combined to permit forming the food bars without breaking up the discrete crisp cookie pieces or otherwise adversely affecting their highly desirable texture. The art as typified by Mody has not proposed such a product and has, therefore, not addressed the problems which would be encountered in making it with conventional technology.

The cookie pieces of the product of the invention are crisp and recognizable both before and after processing. The size is protected by the binder and the process. The texture, while crisp, is protected by the binder. A series of heated compression rolls is used to achieve the desired bar shape by maintaining the pliability of the bar ingredients during shaping by applying gentle pressure. The crisp cookie pieces are not substantially crushed, thereby retaining a light product density. The crisp cookie pieces are not ground into a dust or crumb, which would produce a dense product. The

Application Serial No. 10/091,160  
Attorney Docket No. 67328

claimed fat-based binder is effective in holding them together, yet does not impart the usual chewy bar texture. When the cookie pieces are bound together and lightly compressed for shaping, the product has a light, crispy texture with recognizable cookie pieces. The processing to achieve these results is without precedent in the prior art.

The person of ordinary skill in the art would not have found the invention as a whole obvious at the time the invention was made by reading Mody. The invention employs a specific combination of fats in the binder found to achieve the correct texture and process conditions. It is in the form of a paste unlike that of the Mody reference, which is in the form of an aqueous syrup. The binder of the invention is an essentially dry paste comprised of added sugar in an amount ranging from 25% -70% by weight of the cookie basecake, a filler fat present in an amount ranging from 15% -35% by weight of the cookie basecake, and a coating fat present in an amount ranging from about 5% -20% by weight of the cooked basecake. The types of fats and their proportion to the dry sugar ingredients in the invention forms a paste wherein the sugar granules are dispersed within the fat. This is very unlike the Mody process wherein the binder is an aqueous syrup having only a small amount of fat dispersed within the sugar syrup as a continuous phase. See, for example, Examples 1 and 2 of Mody where the only fat in the core binder is from a small amount of caramel added and mixed with the aqueous corn syrup and high fructose corn syrup. The nature of this binder mixture can be easily shown to be different than that of the invention and not suggestive of a fat-continuous binder.

Referring specifically to the fat ingredients of the binder used according to the invention, it is described in the application text in paragraph 47 in the following terms:

The term "filler fat" as used here is synonymous with "filling fat" and as used here has the meaning generally understood in the art—that is an oleaginous composition which is soft and spreadable at room temperature. A "coating fat" as used herein also has the meaning generally understood in the art—that is a hard, oleaginous material which at room temperature preferably breaks with a snap and which melts sharply at or about body temperature, thus contributing to a mouthfeel associated with cocoa butter.

It is clear to the person skilled in the art that the combination of filler fat, which is soft and spreadable, with coating fat, which have the texture and melt of chocolate, is far different than the syrup-based coatings of Mody. Indeed, they are different and enable the use of slow compression

Application Serial No. 10/091,160  
Attorney Docket No. 67328

with a series of rollers to suitably form the bars without doing damage to the crisp cookie pieces, which retain their visual and organoleptic differentiations.

While both the filler fats and the coating fats have significant solid fat contents – they must not flow at room temperature – the coating fat will require more solids and have a saturated fat content that actually hardens, ideally to snap like chocolate. The person skilled in the art will recognize that syrup-based binders will not have a clean breaking character – they will tend to stretch.

Importantly, the binders of the Mody reference will not cleanly release from a series of rollers if such were employed, and such are not described by Mody. Thus, the fats of the inventive process are distinct and have functional advantage where the product is comprised principally of crisp cookie pieces.

The Mody reference does note the possibility of using cookie pieces as texture additives, but the Mody process still requires specific amounts of different rice components and does not provide a teaching of the high amounts of cookie pieces, their relative size, their crispness or process techniques alone or in combination with specific binders to assure that the cookie pieces are not unduly broken or crushed by processing.

The present invention clearly departs from Mody and the rest of the prior art by utilizing a fat-based binder requiring a blend of the two types of fats. It must have some of the filler fat and some of the coating fat to achieve an effective binder consistency that does not adversely affect either the crisp cookie or a subsequently applied enrobing coating. For use as a binder, the coating fat would be too hard and the filler fat too soft. It is important to the invention that the product is formed cold and is then enrobed. Those skilled in the art would recognize that a syrup-based binder would require some degree of heat and would stick to the rolls in a multi-roll system as presently claimed. The use of a fat-based binder avoids these problems.

The Office Action states that it would be obvious to break the cookies into any intermediate size. However, this is not supported by the references, which simply don't contemplate a product of

Application Serial No. 10/091,160  
Attorney Docket No. 67328

the type applicants have made. Nowhere does the prior art talk of a product made up of a relatively large proportion of relatively large, crisp baked cookie pieces, especially one containing a substantial number of baked cookie pieces which will not pass through a screen with a mesh size of at least about 0.157 inches.

The invention is more than just the idea of using crisp cookie pieces as the central feature of a food bar. The invention enables this in a manner nowhere taught or suggested. Importantly, the selection of crisp cookie pieces and the desire to form them into a food bar, then requires creative thought as to how to form a bar without destroying the distribution of cookie piece sizes and without destroying the crisp cookie texture. Selection of binder materials to provide low moisture, yet cohesion is important. It is a principal advantage of the invention that the claimed binder is compatible with an enrobing coating applied over the surface. The invention provides an indulgent food bar product comprising relatively large fragile pieces of a baked cookie product, giving the product a friable, crunchy texture. The selection of a particular particle size cannot be dismissed as insignificant and obvious. The skilled worker is given no parameters from the prior art within which to optimize or select. And, the prior art does not teach how to bind crisp cookie pieces and shape them into a bar while retaining size and texture. Therefore, the size choice is not obvious within the meaning of the statute.

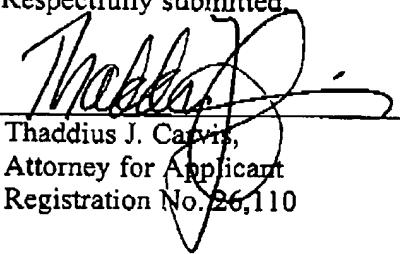
The prior art does not provide sufficient teachings to the person of ordinary skill in the art that would have made the invention as a whole obvious at the time the invention was made. The invention as a whole involves processing crisp cookie pieces to form a food bar containing discrete pieces of crisp cookie bound together by a binder comprised of two different types of normally solid fats, which is an effective binder, performs well during processing and yet can be enrobed without problems for the enrobing or the texture of the cookie pieces. Because the process and the binder ingredients are uniquely combined to permit forming the food bars without breaking up the discrete crisp cookie pieces or otherwise adversely affecting their highly desirable texture, a continuous process is enabled. The failure of the art to address the problems which would be encountered in making such a product with conventional technology is evidence that applicants' invention as a whole unobvious. The only description of such problems and the claimed process for addressing

Application Serial No. 10/091,160  
Attorney Docket No. 67328

them come from applicants' very disclosure of their invention. The prior art is not properly selectively taken apart and recombined, without the benefit of a teaching to do so, to arrive at both a product and process out of the contemplation of the art itself.

Applicants have made a significant contribution to the art of food bars, and especially those that have a crisp texture and can be cold formed continuously. The claims set forth the invention clearly and concisely in terms which distinguish from the prior art. Accordingly, allowance of all claims is believed in order and such action is earnestly solicited.

Respectfully submitted,

  
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